

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be affirmed.

The Appeals Board finds the Administrative Law Judge was correct in utilizing the restrictions of Lawrence R. Blaty, M.D., a board-certified physiatrist. The Administrative Law Judge properly concluded that it is more probably true than not that claimant should observe some restrictions and limitations as a result of his work-related injury which resulted in a herniated disc and surgery at the L5-S1 intervertebral level. Although the neurosurgeon who performed surgery upon claimant, Paul S. Stein, M.D., did not place specific restrictions upon claimant, his notes and testimony indicate restrictions would be appropriate if the respondent failed to provide claimant with a softer riding truck. Also, when asked about Dr. Blaty's specific restrictions, Dr. Stein indicated he did not specifically disagree with them.

Because claimant's date of accident is December 6, 1993 and because his is a "nonscheduled" injury, claimant's right to permanent partial disability benefits is governed by K.S.A. 44-510e which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

Dr. Blaty testified that claimant should be restricted from heavy activities and limited to the light to medium physical demand level. The doctor believes claimant should lift no greater than 35 pounds and only on an occasional basis or 15 pounds more frequently. Claimant should also avoid any bending or twisting while lifting, practice proper body mechanics, and limit his kneeling and crawling. Sitting should be limited to an occasional basis with 30 minute intervals. Claimant should also avoid heavy vibratory activities such as heavy truck driving.

After reviewing a list of the work tasks that claimant had performed over the 15-year period before the December 1993 work-related accident, Dr. Blaty testified that claimant had suffered a 50 percent task loss. Respondent contends that Dr. Blaty's task loss analysis is flawed because it counted the same task more than once. The Appeals Board agrees with that contention. After eliminating the duplication of tasks, the Appeals Board finds, based upon Dr. Blaty's opinions, that claimant is now unable to perform the following seven tasks: driving to and from a lease site using unimproved roads; driving to Hutchinson and Medford to pick up or deliver gas; loading and unloading gases; driving bob-tail and semi trucks to deliver gravel; loading gravel using a front-end loader; loading trucks with a crane; and driving a flatbed truck across country.

The Appeals Board also finds claimant can perform the following eight work tasks: working in the shop area lubricating equipment, changing oil, performing minor repairs and welding broken parts; performing pre-trip DOT inspections; gauging and testing product; loading material into tanks using three-inch hoses; unloading product; dumping product onto screens to remove large stones; chaining and securing loads; and maintaining DOT logs and tracking income and expenses.

Based upon the above, the Appeals Board finds claimant can no longer perform 7 out of 15 of the job tasks enumerated above and, therefore, has sustained an approximate 47 percent loss of ability to perform works tasks that he performed in substantial and gainful employment over the 15-year period before his work-related accident. Although the task lists reviewed by Dr. Blaty treated shop work and vehicle maintenance work as separate tasks, the Appeals Board did not because their descriptions were so similar as to describe the same task which was the routine maintenance of vehicles. However, the Appeals Board does not combine the different types of driving into one task as the descriptions of the driving are significantly different and would require different capabilities.

The Administrative Law Judge was correct in using a 100 percent wage loss for the wage prong of the work disability computation. Because Ms. Terrill testified that claimant retains the ability to earn \$320 per week, respondent contends that the Administrative Law Judge should have used that figure for the wage loss component of the computation. The Appeals Board disagrees. Claimant left respondent's employment because he could not physically tolerate driving respondent's trucks despite their having modified seats. The Appeals Board finds it is more probably true than not true that claimant was physically unable to continue driving for the respondent. Claimant has neither wrongfully refused appropriate accommodated employment nor otherwise wrongfully removed himself from the open labor market in an attempt to manipulate his workers compensation benefits. Therefore, it is not proper to impute an average weekly wage. K.S.A. 44-510e requires the trier of fact to use the actual post-injury average weekly wage which yields a 100 percent wage loss in this instance because claimant has been unable to obtain employment.

Based upon the above, the Appeals Board averages the 47 percent task loss with the 100 percent wage loss and finds that claimant has an approximate 73.5 percent work disability. However, because of the small difference of the work disability found by the Administrative Law Judge and the work disability found by this body, the Appeals Board will not disturb the finding by the Administrative Law Judge and adopts his finding that claimant is entitled to permanent partial disability benefits for a 75 percent permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore dated November 22, 1995, should be, and hereby is, affirmed. The Appeals Board adopts the orders set forth in the Award as its own.

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James P. Johnston, Wichita, KS
Richard J. Liby, Wichita, KS
Becky C. Hurtig, Wichita, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director